United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-4109

United States Court of Appeals

For the Second Circuit.

MATTHEW V. BYRNE and ELVIRA C. BYRNE,
Petitioners-Appellants,
against

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

GORDON P. SCHOPFER and RHONDA F. SCHOPFER,
Petitioners-Appellants,
against

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT.

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P/S

BRIEF FOR PETITIONERS-APPELLANTS.

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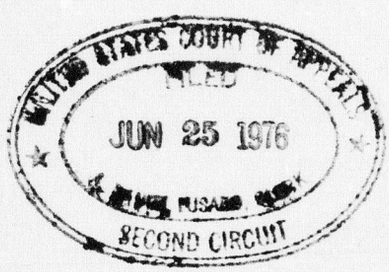

THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1976
(9144)

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

MATTHEW V. BYRNE and ELVIRA C. BYRNE,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

[Docket No. 3315-74]

GORDON P. SCHOPFER and RHONDA F. SCHOPFER,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

[Docket No. 3316-74]

BRIEF FOR PETITIONERS-APPELLANTS

PRELIMINARY STATEMENT

This is an Appeal from a Decision of the United States Tax Court (Tannenwald, J.) filed December 3, 1975, and reported at 65T.C. No. 42. In each case, the Court found certain deficiencies in taxes for the years 1970, 1971 and 1972.

The cases had been consolidated for trial upon Joint Motion (36a-37a).*

STATEMENT OF THE CASE

The pertinent facts, substantially all of which are contained in the Stipulation of Facts (55a-174a) and which are reiterated in the Findings of the Court (40a-42a) indicate that the taxpayers Matthew V. Byrne and Elvira C. Byrne are husband and wife, as are Gordon P. Schopfer and Rhonda F. Schopfer. During the years in issue, 1970, 1971 and 1972, each taxpayer held a 25% interest in the partnership known as Warron Properties Company, the other two partners being John J. Costello and Ralph E. Schopfer. The partnership was created on December 31, 1969, and on that day it acquired from Warron Properties, Ltd., an 8-story office building located in the City of Syracuse. Warron Properties. Ltd., was a New York Corporation whose stock was

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*Numbers in parentheses with the suffix "a" are page references in the Appendix.

owned equally by the four partners. During 1969, its officers were Matthew V. Byrne, Jr., President, and John J. Costello, Secretary and Treasurer.

For the years in question, Warron Properties Company filed partnership returns (Joint Exhibits 7g, 8h and 9i attached to Stipulation of Facts, 125a-145a) claiming an accelerated depreciation of 150% on the building known as the 499 Warren Building which had previously been owned by the Corporation, Warron Properties, Ltd., and which had been conveyed to the partnership known as Warron Properties Company on December 31, 1969.

The position of the Commissioner as originally stated in the Statutory Notice of Deficiency received by each of the taxpayers states:

> "It is determined that adjustments made to Warron Properties Company, of which you are a partner, increase your income in the following manner:
>
> Accelerated depreciation claimed on a building owned by the partnership is not allowable since the used building was acquired as a distribution upon dissolution of a corporation. §167(c) of the Internal Revenue Code. Accordingly, straight line depreciation is being allowed." Earlier, the Agent's notes stated as follows: "Taxpayers claimed an accelerated depreciation of 150% on a building the partnership acquired as a distribution upon dissolution of a corporation. It is the determination of this Agent that taxpayers are limited to the straight line method. Code §167(c) and Regs. 1.167(c)-1(b) state that no accelerated depreciation is allowed a partnership on real property acquired in the above manner."

The Commissioner concedes that the position set forth in the

Notice of Deficiency is incorrect but instead successfully urged before the Tax Court that under §167(j) of the Internal Revenue Code of 1954, the 150% declining balance method of depreciation claimed on a building owned by Warron Properties Company, a partnership, was not allowable under §167(j) because the building constituted used §1250 property acquired after July 24, 1969.

§167(j)(4) of the Code states that the allowance for depreciation of used §1250 property shall be limited to the straight line method except as to used residential property and except that under §167(j)(6)(C) Paragraphs 4 and 5 do not apply in the case of "§1250 property acquired after July 24, 1969, pursuant to a written contract for the acquisition of such property or for the permanent financing thereof, which was, on July 24, 1969, and at all times thereafter, binding on the taxpayer."

STATEMENT OF THE ISSUE

The issue before the Tax Court and upon this appeal is whether with respect to the liquidation of the corporation known as Warron Properties, Ltd., and the transfer of its assets to a partnership known as Warron Properties Company on December 31, 1969, there was on July 24, 1969, a written contract for the acquisition of such property which was, on July 24, 1969, and at all times thereafter, binding upon the taxpayers, so that the use of accelerated depreciation was proper.

THE OPINION OF THE COURT BELOW

The Tax Court (Tannenwald, J.) found the facts as stipulated between the parties and concluded that:

(1) There was not on July 24, 1969, a written contract for the acquisition of the used §1250 property by the taxpayers within the meaning of §167(j)(6)(C) (46a-49a), and

(2) Even if the documentation submitted met the test of a "written contract" under the statute, it was not the kind of written contract Congress had in mind when it carved out the exception contained in §167(j)(6)(C) (51a-54a).

THE WRITTEN CONTRACT

The following facts are undisputed. On June 6, 1969, at a time when the corporation known as Warron Properties, Ltd., was the owner of the 499 Warren Building in the City of Syracuse, and at a time when the stockholders of the corporation were Matthew V. Byrne, Jr., and Gordon P. Schopfer, Appellants herein, as well as John J. Costello and Ralph E. Schopfer, and at a time when the officers of the corporation were Matthew V. Byrne, Jr., as President and John J. Costello as Secretary and Treasurer (58a-59a), a conference was held for the purpose of discussing a liquidation of the corporation and a transfer of its assets to the stockholders. Present at the conference were Matthew V. Byrne, John J. Costello, and Frederick P. Christy

and Francis J. Bellso of Christy, Christy & Bellso, Accountants for the corporation (59a). As the result of that conference, Matthew V. Byrne prepared and forwarded to Gordon P. Schopfer and Ralph E. Schopfer a letter describing the liquidation of the corporation as of June 30, 1969, and a transfer of its assets to a partnership. Attached to the letter was a schedule of depreciation based upon the liquidation (59a). The letter states as follows:

> "Enclosed please find copy of the events that will take place as we liquidate the corporation as of June 30th and carry the property in the form of a partnership through 1973.
>
> In 1969, we will share a $14,500.00 tax loss; in 1970, $23,506.00; in 1971, $17,376.00; in 1972, $11,171.00; and in 1973, $809.00. Thereafter, the partnership will show a profit and, depending upon our situation at that time, we can then transfer the property to a corporation.
>
> We think this is the thing to do and we would hope that you both would approve of it as soon as possible." (165a)

Thereafter, on June 23, 1969, a meeting of the stockholders of the corporation was held at the offices of Byrne, Costello & O'Brien, 499 Warren Building, in the City of Syracuse. Present at the meeting were Matthew V. Byrne, John J. Costello, Ralph E. Schopfer and Gordon P. Schopfer, constituting all of the stockholders of the corporation (60a). The minutes of the meeting dated June 24, 1969, state as follows:

"Memorandum of Conference with Gordon Schopfer, Ralph Schopfer, John Costello and Matthew V. Byrne, Jr.

Under date of June 23rd, John Costello, Grodon Schopfer and Ralph Schopfer met to discuss the liquidation. All items were satisfactory with all parties except for the insurance coverage. Mr. Farrington met with us and fully explained the coverage and thereafter we went to lunch, at which time the four men agreed that we should proceed promptly with the liquidation.

Matthew V. Byrne, Jr." (167a)

The Tax Court found as facts that the consummation of the transaction by June 30, 1969, as planned, proved impractical. Thus, the liquidation of the corporation and the transfer of its assets to the partnership did not occur until December 31, 1969 (42a).

ARGUMENT

The letter of June 6, 1969, when read in conjunction with the Minutes of the meeting of June 23, 1969, constitute a written contract under the laws of the State of New York enforceable against the taxpayers.

POINT I

THE DOCUMENTATION CONSTITUTES A BINDING WRITTEN MEMORANDUM OF AN ORAL AGREEMENT AMONG THE TAXPAYERS.

The Regulations provide" "An agreement shall be considered as a contract binding upon the taxpayer, for purposes of this Paragraph (§167[j]), only if such agreement is in writing, constitutes a contract under the applicable state or local law, and

is enforceable against the taxpayer under such law." Therefore, the issue is whether the written documentation describing the proposed liquidation of the corporation and transfer of its assets to the partnership was (1) in writing, (2) constituted a contract under the laws of the State of New York, and (3) was enforceable against the Petitioners herein.

Under §624 of the Business Corporation Law of the State of New York, "each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its stockholders, board and executive committee, if any***any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time." §624 further provides that such"books and records***shall be prima facie evidence of the facts therein stated in favor of the plaintiff in any action or special proceeding against such corporation or any of its officers, directors or shareholders." Thus, the memorandum of the meeting of stockholders held on June 23, 1969, as prepared by Matthew V. Byrne, the President of the corporation, pursuant to the letter forwarded to the various shareholders under date of June 6, 1969, constituted the minutes of the stockholders' meeting; as such minutes, they are invested with the statutory weight described in §624 of the Business Corporation Law. The minutes of the meeting would be competent evidence in any action between the stockholders for the purpose of showing their act. The minutes would be admissible for the purpose

of enforcing the agreement as between stockholders for the liquidation of the Corporation and transfer of its assets to a partnership comprised of the stockholders (See, for instance, Hubbell v. Meigs, 50 NY 480).

§624 does not require that the minutes be signed; it simply notes that the minutes shall be in "written form or in any other form capable of being converted into written form within a reasonable time." (See, e.g., Woodhaven Bank v. Brooklyn Hills Improvement Company, 69 App. Div. 489, 74 NYS 1023).

The binding effect of the written minutes under §624 was recently demonstrated in Frankowski v. Palermo, 47 A.D.2d 579, 363 N.Y.S.2d 159. The plaintiff in that case, a corporate shareholder, brought an action against the corporation and its President for cancellation of shares of stock issued to the President in consideration of cancellation of his debt to the corporation. The Court noted:

> "The minutes of the Board of Directors Meeting stating that $2,726.00 of corporate debt was canceled in favor of Palermo as consideration for the issuance of 44 shares of $100 par value stock constitute prima facie evidence of the facts stated in the minutes as to the transaction (Business Corporation Law, §624(g)). Respondents Palermo, et al., do not challenge such consideration as recited in the minutes and in such a circumstance they should be bound by the prima facie provisions of §624(g) of the Business Corporation Law."

The Court below, in its decision, concluded (1) that the memorandum of June 24, 1969, did not constitute the minutes of a stockholders' meeting; (2) even if the memorandum did constitute such minutes, the minutes were not a "written agreement" and (3)

the minutes did not provide for a liquidation in kind (46a-49a).

The conclusion of the Court with respect to the memorandum of June 24 would seem to ignore the clear language of the stipulation of facts which states that "on June 23, 1969, a meeting of the stockholders of Warron Properties, Ltd., was held***present at the meeting were Matthew V. Byrne, Jr., John J. Costello, Ralph E. Schopfer and Gordon P. Schopfer, constituting all of the stockholders of the Corporation. A copy of the minutes of the meeting is attached hereto***." (59a-60a). As further support for its conclusion that the memorandum of June 24, did not constitute minutes of a stockholders meeting, the Court noted that they bore the name of the President and not the Secretary, were not signed, and did not bear the designation of Matthew V. Byrne as President. Yet, the requirements which the Court sought to impose with respect to the minutes has no warrant in the statute. Indeed, the Court conceded that there was no statutory requirement for execution of the minutes. Was it not indeed consistent with the small number of stockholders and their unanimity of purpose that the minutes should be simply drawn without bearing any of the formalities that the Tax Court would have attempted to impose, formalities that were not required by the Business Corporation Law. The taxpayers submit that the memorandum of June 24th did constitute the minutes of the stockholders' meeting because that fact has been so stipulated and the document itself clearly so indicates. As to the Court's argument that the

minutes of a meeting are not a written agreement (47a-48a), it is apparent that the citation of California cases is not apropos of the law in New York under §624 of the Business Corporation Law. A written memorandum of an oral agreement is a written contract under the laws of the State of New York. "A contract (con-traho) is a drawing together of minds until they meet. This agreement to do, or not to do, a particular thing, is the contract (emphasis as in original). By statute (2 R.S. 155, §1) when this agreement is to bind an apprentice, it must be committed to writing. This writing, popularly speaking, and even in the statute (2 R.S. 155, 6, §§12, 13) is called the contract; more accurately, it is not the contract, but the evidence of it." (McNulty v. Prentice, 25 Barb (N.Y.) 204, 207). We tend to speak of "written" and "oral" contracts because of the distinction created under the Statute of Frauds as to the enforceability of such contract. The distinction, however, in the light of the true meaning of the term contract is not appropriate. The contract is always the understandings (the meeting of the mind, if you will) communicated orally between the parties. The written instrument is the evidence of those understandings. Thus, to say, as did the Court below, that enforceability is only one element and comes into play after a "written contract" is found to exist begs the question.

A reading of the Regulations interpreting §167(j)(6)(C) indicates the emphasis placed upon the concept of enforceability.

The statute itself speaks of an agreement "binding on the taxpayer". Such enforceability and binding effect attached to the minutes of the stockholders' meeting of June 24th as a written memorandum of the oral understandings of the parties pursuant to the unique provisions of §624 of the Business Corporation Law. Neither the Internal Revenue Code nor the Business Corporation Law requires that the "written contract" be signed by the taxpayers. The Code required only that it be binding on the taxpayers and that binding effect occurs by reason of the evidentiary weight attached to the minutes under §624.

POINT II

THE DOCUMENTATION CONSTITUTES AN AGREEMENT TO LIQUIDATE THE CORPORATION IN KIND AND TRANSFER THE USED §1250 PROPERTY TO THE TAXPAYERS.

The Court below noted that the statute required that the contract be "for the acquisition of such (§1250) (property)." The Court noted that the minutes of the meeting of June 24th simply called for a liquidation of the corporation and not a liquidation in kind (49a). The taxpayers contend that such omission is not fatal to the contractual arrangements for liquidation since the letter of June 6, 1969, and the depreciation schedule attached thereto clearly indicate that the parties intended to "carry the property in the form of a partnership." (165a) What better indication could there be of an intent to liquidate in kind? Beyond that, the Regulations (§1,167[j][6]) state:

> "Contract with undetermined terms or conditions. A contract may be binding upon the taxpayer under this paragraph even if some of its terms are to be determined at a date later than July 25, 1969, provided that the determination of such terms is not within the unrestricted control of the taxpayer, and such terms are in fact subsequently determined. Similarly, a contract may be binding upon the taxpayer under this paragraph even if it is subject to the happening of certain contingencies which have not occurred by July 25, 1969, provided that the happening of such contingencies is not within the unrestricted control of the taxpayer, and the contingencies in fact occur."

Similar language appears in the Regulations with respect to a contract for permanent financing (See Regs. §1.167[j]-4[c][6]). Thus, even assuming that the proposal for a liquidation in kind as set forth in the letter of June 9th could not be incorporated into the minutes of the meeting of June 23rd, nevertheless, the term could have been added by subsequent agreement of the stockholders since such requirement was "not within the unrestricted control of the taxpayer(s)." The transfer of the property to the stockholders on December 31, 1969, conclusively demonstrates that the "liquidation in kind" if not a term of the original agreement, was "subsequently determined."

POINT III

THE DOCUMENTATION CONSTITUTES A BONA FIDE AGREEMENT.

The Court below noted that the Regulations (§1.167[j]-10[3][i]) require that the contract represent a "bona fide agreement negotiated at arms-length." It concluded that that requirement was not met because the purpose of the transaction was tax avoidance. The tax-

payers submit that such a purpose does not, in any way, impair the good faith upon which they entered into the transaction. If they had been able to conclude the liquidation of the Corporation and the transfer of the building to themselves as partners on June 30, 1969, as originally planned, no one would be in a position to question their good faith. So, on what basis, should their bona fides be attacked because of the fact that the transaction was not consummated until December 31, 1969? The transaction had substance, it was not a sham, the agreement of the parties was reduced to written form and the transfer of the property did, in fact, occur. How then can one say that the agreement was not "bona fide"?

POINT IV

A WRITTEN AGREEMENT FOR THE LIQUIDATION OF THE CORPORATION AND THE TRANSFER OF ITS ASSETS TO THE TAXPAYERS CONSTITUTES A "WRITTEN CONTRACT" WITHIN THE MEANING OF §167(j)(6)(c).

In order to bolster its conclusion that the statutory exception with respect to §1250 property was not available to the taxpayers in this case, the Court below felt that it was led "inexorably" to the conclusion that the written contract between the parties here is not the type of written contract that Congress had in mind when it carved out the exception contained in the Code. Without dealing at length with the citation of authorities in the opinion of the Court, the taxpayers contend that such authorities have no binding effect in this case in that they are distinguishable

on their own facts or relate to statutory language unlike that which is the subject of this Appeal. Is not the real issue here whether there was on July 24, 1969, a written contract under applicable New York law enforceable against the taxpayers? If there was such a contract, taxpayers contend that the Congressional intent in carving out the statutory exception is satisfied.

To adopt the view of the Court below would be to create a distinction which appears no where--neither in the Statutes, nor in the Regulations. As was stated in Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501, and reiterated in Bingler v. Johnson, 394 U.S. 741, 750, the Regulations "must be sustained unless unreasonable and plainly inconsistent with the Revenue Statutes," and "should not be overruled except for weighty reasons." To say that the contract between the parties in the instant case was not the type of contract intended by Congress, would be, in effect, to overrule the Statute by deciding that such contract does not conform to the Statute even though it was in writing and was on July 24, 1969, and at all times thereafter binding upon the taxpayers, and would likewise be to overrule the Regulation by deciding that such agreement does not conform to the Regulation even though it was in writing and constituted a contract under New York law and was enforceable against the taxpayers under such law. In short, the distinction proposed by the Tax Court in its Decision is one which finds support neither in the language of Congress nor of the Commissioner.

CONCLUSION

THE DECISION OF THE TAX COURT IN EACH CASE SHOULD BE REVERSED AND THE CASES REMANDED FOR ENTRY OF AN ORDER DIRECTING THAT THE DEFICIENCIES FOR THE YEARS 1970, 1971 AND 1972 BE DISAPPROVED AND DISALLOWED.

Respectfully submitted,

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